



JOINT SUBMISSION TO PARLIAMENT ON THE DRAFT PUBLIC PROCUREMENT BILL

12 September 2023

Hon. J Maswanganyi, MP, Chairperson: Standing Committee on Finance (National Assembly)

Attention: Committee Secretaries, Mr Allen Wicomb and Ms Teboho Sepanya

Email: awicomb@parliament.gov.za / tsepanya@parliament.gov.za

For further information, contact:

Motlatsi Komote
BJC 2023 Chairperson
motlatsikomote@gmail.com / budgetjusticesa@gmail.com

Tsukudu Moroeng
BJC Working Group Lead: Procurement and Corruption
tsukudu@lrc.org.za

Lisa Higginson
Imali Yethu Deputy Coordinator
lisa.higginson@ru.ac.za

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INTRODUCTION

The [Budget Justice Coalition \(BJC\)](#) and [Imali Yethu \(IY\)](#) appreciate the opportunity to contribute to the deliberations on the Public Procurement Bill, 2023, an essential legislative initiative that seeks to address a longstanding need for a comprehensive framework governing public procurement in South Africa. It is with a firm commitment to the principles of transparency, accountability, and the efficient allocation of public resources that we make this submission. In addition, the BJC and IY request an opportunity to make an oral submission to Parliament on the Bill.

This submission has been collaboratively written by social justice activists within IY and the BJC including those located within the Working Group on Procurement.

IY is a civil society coalition for open budgets. Imali Yethu is committed to open, accountable governance. The purpose of the BJC is to collaboratively build people's understanding of and participation in South Africa's planning and budgeting processes – placing power in the hands of the people to ensure that the state advances social, economic and environmental justice, to meet people's needs and wellbeing in accordance with the Constitution.

The organisations who make up the BJC are: Alternative Information and Development Centre (AIDC), the Children's Institute at UCT (CI), Corruption Watch (CW), Equal Education (EE), Equal Education Law Centre (EELC), the Institute for Economic Justice (IEJ), Oxfam SA, Pietermaritzburg Economic Justice and Dignity Group (PMEJD), the Public Service Accountability Monitor (PSAM), the Rural Health Advocacy Project (RHAP), SECTION27, Ilifa Labantwana, Treatment Action Campaign, the Legal Resources Centre (LRC), Centre for Child Law (CCL), 350.org, Open Secrets, Social Policy Institute, Public Affairs Research Institute, Amandla.mobi, Black Sash as well as friends of the coalition.

BACKGROUND

The introduction of the Public Procurement Bill [B 18 - 2023] is the most significant development in public procurement regulation in democratic South Africa. The BJC, Ilai Yethu and many other organisations that advocate for advancement and betterment of socio economic rights regard the Public Procurement Bill as being a significant piece of legislation for a multitude of reasons. This Bill comes at a time when corruption in procurement is rife and there are concerns about the safeguarding of socio-economic rights in South Africa.

In the fiscal year 2021-22, national and provincial auditees were tasked with managing an estimated expenditure budget totaling R2.58 trillion. While there has been a gradual improvement in the overall quality of audit outcomes at both the national and provincial levels, it is noteworthy that out of the total of 424 auditees, the 128 auditees that achieved a clean audit status oversee a mere 6% of the R2.58 trillion expenditure budget. In 2021-22, an amount of R51.22 billion was reported as irregular expenditure for the national and provincial spheres. This equates to 2% of the expenditure budget. The Auditor General (AG) conducted an assessment of the impact of this irregular expenditure in order to provide valuable insights to Portfolio Committees. The AG's assessment revealed that a significant portion - R38.68 billion - stemmed from breaches of legislation that mandates fair, equitable, transparent, competitive, and cost-effective procurement practices. The balances of unauthorised, irregular, and fruitless and wasteful expenditure continue to be alarmingly high, reaching a total of R461.05 billion. This high figure is largely

attributed to the sluggish progress in conducting investigations into these financial discrepancies. As of August 31, 2022, the Auditor General had identified a total of 179 material irregularities (MIs). The AGSA's estimations indicate that the cumulative financial loss resulting from these MIs amounts to R12 billion.¹

During the fiscal year 2021-22, local government was allocated an estimated expenditure budget of R539.13 billion to fund its operational activities and service delivery responsibilities. However, during this period, the AG reports that municipalities incurred a substantial amount of irregular expenditure, amounting to R30.34 billion. Additionally, as of the end of the 2021-22 financial year, there remained a staggering accumulated balance of irregular expenditure totaling R136 billion, alongside unauthorised expenditure reaching R107.38 billion, and fruitless and wasteful expenditure amounting to R14.65 billion.²

South Africa's finances are under immense pressure, and recent announcements by the National Treasury signal the need for further budget cuts, and additional measures to raise revenue. We cannot afford to continue to waste scarce financial resources while so many South Africans are in need.

The BJC and IY note with grave concern the short timeframe allocated to processing this Bill, which may negatively impact meaningful public participation through the shortened timeframes for public input. We therefore encourage the Legislature and National Treasury to uphold and strengthen the public's Constitutional right to participate and not act in a manner that is contrary to their mandates and democratic principles. This will become even more consequential during the public participation process relating to the Regulations that will be gazetted by the Minister of Finance.

GENERAL COMMENTS

Support for an Overarching Legal Framework: We firmly support the need for an overarching legal framework to streamline and consolidate the diverse array of regulations governing public procurement. The reduction of fragmentation in this area is crucial to enhance efficiency, transparency, and accountability in public spending.

Positive Step with Room for Improvement: Our assessment of the long-awaited Public Procurement Bill is that it represents a positive step towards addressing critical issues in procurement processes. However, we believe there are areas where the Bill can be further strengthened to ensure its effectiveness in achieving its intended objectives.

Closing Legislative Gaps from State Capture: The Bill's introduction comes in the wake of a prolonged period of deliberations by the State Capture Commission. It is imperative that this legislation addresses and closes the legislative gaps that allowed grand corruption to occur on an unprecedented scale in South Africa. This Bill must serve as a bulwark against such abuses of power in the future.

Institutional Arrangements: One notable shortcoming in the Bill is the proposed institutional arrangements. The lesson drawn from the patronage networks established through state capture is that a clear division of functions and responsibilities is a crucial safeguard against corruption and abuse of

¹ Auditor General of South Africa. 2023. PFMA report 2022. <https://www.agsareports.co.za/home-agsa-reports/pmfa/>.

² Auditor General of South Africa. 2023. MFMA report 2022. <https://mfma-2022.agsareports.co.za/>.

power. The Bill, as it stands, concentrates significant power in the hands of the Public Procurement Office and the Minister of Finance, which presents inherent risks.

Addressing Risks through Institutional Safeguards: In light of these risks, we urge Parliament to consider the recommendations put forth by the State Capture Commission, particularly the establishment of an Anti-Corruption Agency. Separation of powers and well-functioning institutions are critical to providing the necessary checks and balances to prevent undue influence and corruption in the public procurement process.

Balancing Multiple Aims: It is important to recognize that the Public Procurement Bill must simultaneously achieve a variety of aims. While it seeks to promote efficiency and cost-effectiveness in public spending, it must also uphold the principles of transparency, accountability, and integrity. Striking the right balance between these objectives is paramount to the Bill's success in promoting good governance and protecting the interests of the South African people.

Transparency is regarded as one of the most powerful instruments for discouraging corruption and enhancing accountability in public procurement. Transparent procurement information requires the standardisation of processes and simplified access to detailed procurement information that is easy to understand, readily available and accurate. Despite “bold steps” to enhance transparency through the establishment of the OCPO, and through several instruction notes requiring mandatory publication of procurement information, it is currently very difficult to acquire even basic procurement information that enables procurement monitoring by the public. The Procurement Bill **must** address this, ensuring adequate access to information and open data, along with active and timely responses to requests for information.

Procurement as a strategic imperative: In examining the language and structure of the Bill, it raises concerns regarding the prospect of fostering an organisational culture shift away from the prevailing approach, characterised by excessive bureaucracy that, in turn, undermines efficient service delivery. We must recognize that an excess of lengthy procedures does not equate to the establishment of effective preventative controls. Therefore, we believe it is essential to further consider how the Bill can promote a culture of efficiency, responsiveness, and streamlined processes, all while upholding the necessary safeguards to prevent misconduct and abuse of power.

In summary, our overall position on the Public Procurement Bill is that we welcome its tabling and support that there should be overarching legislation to address past shortcomings. We advocate for careful consideration of potential revisions to ensure that the Bill effectively mitigates the risks associated with concentrated powers while strengthening the institutional framework to prevent corruption and uphold the highest standards of public service delivery.

The submission is presented in a chapter-by-chapter table format, which includes the existing text, accompanying comments, and proposed changes. This format facilitates the alignment of specific recommendations with the corresponding sections of the Bill, ensuring clarity and ease of reference.

PREAMBLE

Section	Current formulation	Comment / suggested change
Whole	Not included in Bill	<p>Comment: The Bill fails to recognise a core purpose of public procurement is to deliver goods and services for the fulfilment of human and socio-economic rights. This must be expressly recognised to ensure that the public procurement system functions with this core purpose in mind. While this may go without saying, the gross irregularities in public procurement highlight a neglect for socio-economic rights by procuring institutions. Therefore, this goal must be expressly recognised as a stark reminder about what each decision in tender and procurement processes is aimed at achieving.</p> <p>Recommendation:[include in preamble]:</p> <p><i>“AND RECOGNISING that the public procurement system is fundamental to the delivery of goods and services; and that public procurement is a key mechanism through which the state fulfils its constitutional obligations to respect, protect, promote and fulfil human rights. Further, that unfair, inequitable, non-transparent, uncompetitive, unduly costly, corrupt, inefficient and ineffective procurement processes infringe on the protection, promotion and fulfilment of human rights.”</i></p>

CHAPTER 1: DEFINITIONS, OBJECTS, APPLICATION AND ADMINISTRATION OF ACT

Section	Current formulation	Comment / suggested change
All	N/A	<p>Comment: There are key terms which are referred to in the Bill but which are not defined in Chapter 1. The terms not included, which are of concern to the BJC, are:</p> <ul style="list-style-type: none"> • Conflict of interest [section 10(d)] • Undue influence [section 10(c)]

		<p>Recommendation: [insert]</p> <p>“Conflict of interest” means instances where a person has some interest that could materially interfere with their duty to act impartially in decision-making processes.</p> <p>“Undue influence” means an instance where a person takes advantage of a position of power over another person to influence their decision-making.</p>
2(1)	All	<p>Comment: The provision does not state that its core object is to provide a national legislative framework for the decision making in public procurement binding on all organs of state. The Act cannot simply confer powers, it must also provide a framework to limit the powers and functions it confers and to prevent an abuse of such powers. It also does not recognise the fulfilment of socio-economic rights as a core object. All the provisions of this Bill are therefore drafted in the absence of this key goal. The provision also has an unduly constrained definition of what its object is. Certain provisions of the Bill go further than simply “introducing uniform treasury norms and standards for all procuring institutions” and “determining a preferential procurement framework”. For example, the entire creation of the Public Procurement Office goes further than what is defined in the clause.</p> <p>Recommendation: [insert]</p> <p>“2(1) The objects of this Act are, with due regard to sections 195, 216 and 217 of the Constitution, to -</p> <ul style="list-style-type: none"> (a) <i>Serve as a national framework for public procurement in South Africa;</i> (b) <i>Regulate the public procurement system as contemplated in section 217 of the Constitution, for the promotion, protection and fulfilment of human rights;</i> (c) Introduce uniform treasury norms and standards for all procuring institutions to implement their procurement systems as envisaged in section 217(1), read with section 216(1) of the Constitution; and (d) Determine a preferential procurement framework for all procuring institutions within which to implement their procurement policies as envisaged in section 217 (2) and (3) of the Constitution.”
3	(3) This Act applies to— (a) all procurement carried out by a procuring institution, including	<p>Comment: the reference in (b) to any person who submits a bid or has been awarded a bid has an unduly limiting scope of application. It suggests that only such persons are bound by the provisions of this Act. This is not true if regard is had to the remainder of the provisions</p>

	<p>procurement through donor or grant funding; and (b) <u>any person who submits a bid or has been awarded a bid.</u></p>	<p>of the Bill which involve multiple stakeholders and the purpose of the Bill which is to ensure that all persons who are involved or participate, directly or indirectly in procurement processes, are bound by its provisions. Indeed it is possible that those who indirectly participate in procurement processes, even though they themselves might not be submitting a bid or may have been awarded a bid, must still comply with the principles that the Act seeks to advance and section 217 of the Constitution.</p> <p>Recommendation: [insert]</p> <p>(3) This Act applies to— (a) all procurement carried out by a procuring institution, including procurement through donor or grant funding; and (b) <u>any person who participates in any stage of the tendering or procurement process, including all bidders.</u></p>
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CHAPTER 2: PUBLIC PROCUREMENT OFFICE, PROVINCIAL TREASURIES AND PROCURING INSTITUTIONS

Section	Current formulation	Comment / suggested change
4.	<p>(1) There is hereby established a Public Procurement Office within the National Treasury.</p> <p>(2) The Head and officials of the Public Procurement Office must perform their functions in terms of this Act impartially and without fear, favour or prejudice.</p>	<p>Comment: (4.1 and 4.2) While the Bill directs that officials in the Public Procurement Office (“PPO”) must perform their functions in terms of this Act impartially and without fear, favour or prejudice, the arrangements set up ways in which officials may be undermined in their endeavours to do so. By being a unit within the National Treasury, the PPO can be undermined through poor provision of shared services such as HR and IT services. There is also a risk of PPO being considered a ‘secondary’ user of Treasury’s services and core functions being given priority. The PPO can also be undermined by an inadequate allocation of budgetary resources and personnel. National Treasury is a procuring institution itself and officials at the PPO may find it a challenging dynamic to regulate the Treasury of which it is a part and in a sense of these arrangements is subordinated to. The lack of independence also creates a risk of conflict of interest and undue influence for officials within the National Treasury who have personal or financial interests in procurement decisions. This is more risky in the context of transversal contracts where the National Treasury plays a direct role. In addition, Part 1 Volume 1 of the Report of the Judicial Commission of Inquiry into State Capture given the need and the rationale for combating corruption that State capture has shown, the requirement of independence is not</p>

		<p>satisfied sufficiently if such an institution sits within a government department:</p> <p><i>“The ultimate responsibility for leading the fight against corruption in public procurement cannot again be left to a government department or be subject to Ministerial control. What is required are specialised oversight and monitoring authorities which operate upon the basis that they are independent in the full and untrammelled sense, i.e. that they are subject only to the Constitution and the Law. This also implies that the choice of officials who will lead and staff such bodies is not left in the discretion of Government. Such appointments must be in accordance with a transparent procedure in a public process.”</i></p> <p>We note with concern that the Bill does not adopt the Commission’s recommendation.</p> <p>Absent from the Bill are key provisions that ensure the impartiality and independence of the PPO, including the process of appointment of the Head of the PPO; the protection of employment of the Head; the employment of staff; and how the independence of the PPO will be ensured as a body which sits inside the National Treasury. Organisational protections such as these are crucial to any independent oversight body and, without them, it leaves the PPO open to political interference and partiality. In light of the extensive powers granted to the PPO, we are especially concerned regarding the absence of a transparent and public appointment process of the head.</p> <p>Recommendation: The entire provision must be removed and replaced with provisions for an independent body (such as a Public Procurement Regulator).</p>
5. (1)	(c)(ii) ensure the professional development and training of officials involved in procurement;	<p>Comment: (5(1)(c)(ii)) The mandate to provide professional development and training of officials involved in procurement is going to require significant effort. Senior Management Service level officials with service delivery facing roles have not always been trained on procurement because it is not considered core to their role, but in practice will be requested to prepare Terms of Reference and play a role in Bid Adjudication Committees. Supply Chain Management (“SCM”) and contract administrators need training that includes understanding how their roles link strategically to well-functioning service provision as opposed to being merely administrative.</p> <p>Recommendation: Insert provisions on formalising and professionalising public</p>

		procurement by creating a Procurement Officer's Profession and establishing a professional body that will oversee and regulate the profession.
5. (2)	<p>(2) The Public Procurement Office may, in accordance with this Act—</p> <p>(a) issue binding instructions as provided for in this Act and on any other procurement matter for the effective implementation of this Act; (b) issue non-binding guidelines to assist procuring institutions with the implementation of this Act or any other procurement related matter;</p> <p>(c) determine a model procurement policy for different categories of procuring institutions and different categories of procurement;</p>	<p>Sections 5(2)(a) and (b) grant the PPO the powers to issue binding instructions and issue non-binding guidelines.</p> <p>Broadly speaking, the Bill's use of multiple binding and non-binding instruments has the potential to create significant regulatory confusion. It maintains the <i>status quo</i> where there are a plethora of regulatory instruments governing procurement and perpetuates the issue of "over-regulation of public procurement" which this Bill is aimed at preventing.</p> <p>Moreover, there is an unclear, and in some cases, inconsistent use of the term "instructions" throughout the Bill. For example, even though "instruction" is defined as "<i>an instruction issued by the Public Procurement Office in terms of section 5</i>", Provincial Treasuries may also issue their own binding instructions in terms of section 6(2)(a).</p> <p>Significantly, the definition of "this Act" in section 1 of the Bill includes reference to "instructions". This has wide-ranging implications for the legal effect of instructions. For example, any offence committed in terms of the Act, would include an offence committed in the implementation of any instruction. In addition, by including "instructions" in the definition of "this Act" (especially when those instructions are binding, have serious consequences for non-compliance and can be issued on any topic at full discretion of the issuing body), the Bill essentially gives the PPO and Provincial Treasuries <i>de facto</i> unfettered law making power.</p> <p>The power afforded to the PPO to issue "<i>binding instructions as provided for in this Act and on any other procurement matter for the effective implementation of this Act</i>" is too broad since the only other provision which specifies / guides the scope and exercise of that power is section 5(3), which simply states that instructions may be issued for different categories of institutions, goods, services or infrastructure. This results in an overly broad power / discretion.</p> <p>Recommendations: The definition of "this Act" in section 1 of the Bill be amended to remove reference to "instructions"; A section be introduced in the Bill that limits the scope</p>

		and ambit of the power to issue binding instructions, and details and circumscribes the specific issues around which binding instructions be issued; The definition of “instructions” to be amended to provide clarity and bring coherence to where the Bill gives other institutions that are not the PPO the power to issue instructions.
5. (3)	(3) The Public Procurement Office may issue different instructions in terms of subsection (2) for— (a) different categories of procuring institutions; and (b) different categories of procurement.	<p>Comment: (5.3) If one department is involved in various categories of procurement for example DPW needing to procure stationery and IT for internal use, as well as maintain infrastructure as its externally facing mandate, it is going to be quite complex. It is recommended that the PPO is granted powers only to issue a single instruction which can itself deal with the different categories of procurement categories and procuring institutions. This is instead of having multiple instructions which will perpetuate the proliferation of legal instruments and confuse procurement officials.</p> <p>Recommendation: that the provision be removed and replaced with the following:</p> <p style="text-align: center;"><i>(3) The Public Procurement Office may, in its instructions issued in terms of subsection (2) include provisions for— (a) different categories of procuring institutions; and (b) different categories of procurement</i></p>
6. (2)	(2) A provincial treasury, within its province, may— (a) issue binding provincial instructions on procurement matters for the effective implementation of this Act and not inconsistent with an instruction issued by the Public Procurement Office; (b) issue non-binding guidelines to assist procuring institutions with the implementation of this Act or any other procurement related matter; (c) assist procuring institutions in building their capacity for efficient, effective and transparent procurement management;	<p>Comment: (6.2) This is going to result in an extreme amount of complexity in that each province could have instructions and guidelines that are different. This further perpetuates the problematic nature of the current legal framework.</p> <p>Recommendation: Consider whether this extent of complexity will be beneficial and if this section should therefore be retained.</p>

	<p>(d) if of the view that the procurement policy applied by a procuring institution does not comply with a provision of this Act, review such policy and advise on amendments; and</p> <p>(e) exercise other powers conferred by this Act.</p>	
6. (3)	<p>(3) A provincial treasury may issue different instructions in terms of subsection (2)(a) for—</p> <p>(a) different categories of procuring institutions; and</p> <p>(b) different categories of procurement.</p>	<p>Comment: Adding to the complexity of different provinces having different instructions, there can be different instructions for different categories of procuring institutions and categories of procurement too. This is going to make the task of persons serving in the Tribunal extremely challenging. The same concerns highlighted in terms of section 5 (3) apply here. Provincial treasuries should not be granted powers to regulate procurement processes by instructions.</p> <p>Recommendation: the entire provision should be removed.</p>
6. (4)	<p>(4) If a provincial treasury is of the view that the procurement policy applied by a procuring institution, which is a municipality or municipal entity in its province, does not comply with a provision of this Act, the provincial treasury may, after consultation with the Public Procurement Office, review such policy and advise the institution on amendments.</p>	<p>Comment: affording provincial treasuries review powers will add to the complexity and confusion. If the PPO or other institution has (or will be) granted review powers, the value of the role of provincial treasury is not clear.</p> <p>Recommendation: the entire provision should be removed.</p>
8. (1)	All	<p>Comment: (8.1) There is no point 'c'.</p> <p>Recommendation: The alphabetical order should be rectified.</p>
8. (2)	<p>(a) A procuring institution may, as prescribed, reconsider its own decision made in terms of this Act, <u>if the decision was based on error of law, error of fact or fraud.</u></p>	<p>Comment: The provision does not require a procuring institution to consult either with the Public Procurement Office or Provincial Treasury when reconsidering its own decision. Thus, there is no oversight over whether the reconsideration of any decision is in actuality due to an error of law, error of fact or fraud. The powers given to the PPO and to Provincial Treasuries similarly do not provide for oversight over the reconsideration of decisions by</p>

		<p>procuring institutions.</p> <p>Recommendation: “A procuring institution may, as prescribed, [<i>and in consultation with the Public Procurement Office</i>], reconsider its own decision made in terms of this Act, if the decision was based on error of law, error of fact or fraud.”</p>
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CHAPTER 3: PROCUREMENT INTEGRITY, PROHIBITION OF CERTAIN PRACTICES AND DEBARMENT

Section	Current formulation	Comment / suggested change
9. (1)	An accounting officer or other official, a member of an accounting authority, a bid committee or the Tribunal, a bidder or a supplier or any other person, involved in procurement in terms of this Act, must comply with the prescribed code of conduct.	<p>Comment: The Bill does not say who is responsible for issuing the prescribed code of conduct. It also does not say where it must be stored (e.g. online and/or physically at the PPO’s office). It is not clear how the code of conduct may be updated if required.</p> <p>Recommendation: It must be indicated who is responsible for issuing the prescribed code, where it must be stored and how it may be updated.</p>
11. (1)	A procuring institution must take steps in accordance with prescribed procedures to identify— (a) automatically excluded persons as envisaged in section 13 and their immediate family members; and (b) related persons as envisaged in subsection (3).	<p>Comment: It is not clear how procuring institutions will check if officials disclosed who all their family members and related persons are, and if this will be made easily searchable for other departments. It is not clear what “take steps” means. This renders the clause ambiguous. The clause should state clearly who will determine the procedures and where they will be contained.</p> <p>Recommendation: [remove entire provision and insert]</p> <p><i>The Minister must, in terms of regulation, prescribe procedures to identify— (a) automatically excluded persons as envisaged in section 13 and their immediate family members; and (b) related persons as envisaged in subsection (3).</i></p>

11. (2)	<p>(2) (a) The steps envisaged in subsection (1) include the prescribed declaration of interest to be made by— (i) all bidders, in the case of bids; and (ii) all applicants, in the case of applications for registration on a database created by the Public Procurement Office in terms of section 5(1)(i). (b) A failure to submit a declaration or submitting a false declaration renders a bid invalid.</p>	<p>Comment: It is unclear:</p> <ul style="list-style-type: none"> ● How it will be determined whether a declaration of interest has been submitted. ● What mechanisms are there for SCM officials in procuring entities to use to check if the declaration is false. ● Who will have oversight before the AGSA’s audit to be able to say that the declaration was not submitted or is false. <p>Recommendation: This section must include a requirement for the declaration along with a document that shows which checks were performed as part of the paper trail.</p> <p>Recommendation: The Bill should outline what steps can be taken if a false declaration is submitted.</p>
11. (3)	<p>If a person related to an accounting officer or other official or a member of an accounting authority, a bid committee or the Tribunal involved in procurement in terms of this Act, has, or intends to acquire, a direct or indirect personal interest in a procurement matter, the accounting officer or other official or a member of an accounting authority, a bid committee or the Tribunal—</p> <p>(a) must disclose such interest, immediately after receiving the agenda of the meeting of a bid committee of the procuring institution regarding a procurement, or on notification of a matter being brought to the attention of the bid committee or at any time during the consideration of the bid when the official or other person becomes aware of the interest; and</p> <p>(b) may not be present at or participate in the deliberations or decision-making process of the procuring institution in</p>	<p>Comment: If the person bidding is related to the accounting officer, the bid is meant to be excluded. If the person bidding is related to the accounting officer or other official, based on the exclusion provisions contained in the Bill, the bid may be meant to be excluded. If that is the case, the bid would not be eligible which would render this provision obsolete. However, this is a good provision, as it requires of officials that they disclose the interest and that they may not be present in the deliberations. Procurement practitioners say that it is difficult to check eligibility as there is no comprehensive list, particularly at local government level.</p>

	relation to the agenda item or the matter in question.	
11. (4)	A disclosure of interest made in terms of subsection (3) must be recorded in the minutes of the meeting at which it is made, or it relates to or any document seeking a decision.	<p>Comment: Since it appears that in terms of the transparency levels the minutes will not be publicly available, the record of the disclosure will not be available to civil society. The state’s own oversight appears insufficient in practice to ensure that such preventative controls are actually meaningfully implemented. This provision will therefore only comply with transparency principles if it is contained in a document that will be made available under Part 3 of the Bill.</p> <p>Recommendation: [remove entire provision and insert]</p> <p><i>“A disclosure of interest made in terms of subsection (3) must be recorded, and made available in accordance with the provisions in Part 3 of this Act.”</i></p>
13. (1)	<p>Automatic exclusion from procurement 13. (1) The following persons may not submit a bid:</p> <p>(a) A public office bearer;</p> <p>(b) a leader of a political party registered in terms of the Electoral Commission Act, 1996 (Act No. 51 of 1996);</p> <p>(c) a person appointed in terms of section 9 or 12A of the Public Service Act, 1994 (Proclamation No. 103 of 1994);</p> <p>(d) an official or employee of a constitutional institution listed in Schedule 1 to the Public Finance Management Act;</p> <p>(e) an official or employee of a public entity listed in Schedules 2 and 3 to the Public Finance Management Act;</p> <p>(f) an official or employee of a municipality or municipal entity;</p> <p>(g) any entity in which a person mentioned in paragraphs (a) to (f) is a director or has a controlling or other</p>	<p>Comment: (13.1.b) The Electoral Commission Act does not define who is considered a leader of a political party. It may be subject to interpretation as to who a leader is.</p> <p>Recommendation: Define ‘leader of a political party’ in Chapter 1, Section 1.</p> <p>Comment: (13.1.h) In practice, persons and companies that should be debarred are not being debarred. The bill does not appear to make provisions that change the dynamic where it is the responsibility of the Accounting Officer to recommend the debarring. Therefore, if the Accounting Officer in a procuring entity is themselves involved in wrongdoing, the dynamic of a procuring institution that has come to have a generally corrupt approach will likely continue.</p> <p>Recommendation: Insert into the Bill that bodies such as the Tribunal, Auditor General, SIU and Hawks may recommend debarment to the PPO.</p>

	<p>substantial interest; (h) a bidder or supplier debarred in terms of section 16; (i) an entity in which a bidder or supplier debarred in terms of section 16— (i) has a controlling interest; or (ii) is a director or a member; and (j) an executive member of a controlling body of a procuring institution.</p>	
<p>13. (2) and (3)</p>	<p>(2) A non-executive member of a controlling body of a procuring institution may not submit a bid in that institution. (3) A person related to a person referred to in paragraph (a), (c), (d), (e) or (f) of subsection (1) may not submit a bid in the institution in which the person is a member or employed.</p>	<p>Comment: (13.3) It is going to be difficult for SCM officials to figure out who a person is related to without some sort of Home Affairs search functionality. Additionally, the definition of related persons that is referenced is contained in the Companies Act which simultaneously refers to related and interrelated persons in a manner where it is not entirely clear who is a related person and who is an inter-related person.</p> <p>The legal terms contained in the relevant section of the Companies Act will additionally be tricky for SCM administrators to interpret the meaning of accurately.</p> <p>Recommendation: The PPO should issue a toolkit that explains to SCM personnel in an understandable manner who is excluded from submitting a bid and who is not. Furthermore, the PPO should develop an electronic functionality for SCM to record and check this.</p>
<p>14(1) and (2)</p>	<p>Directions inconsistent with Act</p> <p>14. (1) If an accounting officer, an accounting authority, a member of an accounting authority or an official of a procuring institution (herein called “the affected person”) is directed by any person with authority over the affected person (herein called “the person with authority”), to do or omit to do anything in respect of procurement, which the affected person believes he or she is not authorised to do in terms of this Act, the</p>	<p>Comment: (14.1a) The fact that the Bill requires officials with a power differential compared to politicians to commit their objections to writing may put officials (who in effect become whistleblowers) in danger. This in turn could make it difficult to fill Accounting Officer positions, which are usually five year contracts that are political appointments.</p>

	<p>affected person must not comply with the direction and immediately— (a) submit in writing to the person with authority, the objection and the reason for the objection; and</p> <p>(b) inform in writing his or her supervisor, where applicable, and the Public Procurement Office, of the direction, the objection and the reason for the objection.</p> <p>(2) The affected person may not, despite any term of his or her employment, be subjected to any disciplinary measures due to the non-compliance with the direction of the person with authority</p>	<p>Comment: (14.2) How does the affected person who is faced with detriment such as being pushed out of the job (constructive dismissal) flag that this is occurring? By the time of getting to the CCMA, the person who is trying to hold their ground to ensure procurement integrity has usually effectively been subverted and officials in the department have already received a message about the organisational culture which is that it is not worthwhile to speak up.</p> <p>Recommendation: It should be included in the Bill that if disciplinary procedures are initiated after an official has indicated their objection in writing, they may alert the PPO and the PPO may recommend that those disciplinary proceedings are conducted by a relevant body (such as the Public Service Commission or DPSA) aside from the procuring institution.</p>
15.	<p>Prohibition of certain practices</p> <p>15. (1) The Public Procurement Office—</p> <p>(a) may in accordance with a prescribed process declare a particular procurement practice to be prohibited for all or a category of procuring institutions; and</p> <p>(b) must publish the declaration.</p> <p>(2) The Public Procurement Office must take into account the following principles when considering whether to prohibit a practice:</p> <p>(a) That the practice concerned is not likely to result in fairness, equity, transparency, competitiveness or</p>	<p>Comment: (15.1a) What is the prescribed process that is referred to here?</p> <p>Comment: (15.1b) Where must the declaration be published? (In the government gazette, on the PPO's website?)</p> <p>Recommendation: The declaration must be published timeously in the government Gazette and the PPO website for public access.</p>

	<p>cost-effectiveness, or to promote socioeconomic, industrial or environmental development; and</p> <p>(b) that if the practice is allowed to continue, it is likely to defeat the objects of this Act.</p> <p>(3) A procuring institution may not apply a procurement practice declared prohibited in terms of subsection (1).</p>	<p>Comment: (15.3) What is the remedy if a procuring institution ignores this provision of the Act?</p> <p>Recommendation: Procuring institutions making use of a prohibited practice must be subjected to penalties which must be referred to in the Bill.</p>
<p>16. (1) and (2)</p>	<p>Debarment</p> <p>16. (1) Before issuing a debarment order in terms of this section, the Public Procurement Office must provide the bidder, supplier or any of the directors, members, trustees or partners of that bidder or supplier (herein called “the affected person”) with a notice of the intention to debar.</p> <p>(2) The notice must—</p> <p>(a) indicate the reason for the intended debarment; and</p> <p>(b) invite the affected person to provide reasons within 10 days why he or she must not be debarred.</p>	<p>Comment: (16.1) The Bill is silent in terms of what must occur when a supplier who is debarred is already engaged in contracts by other state departments and entities.</p> <p>Comment: (16.2) 10 days appears a fair amount of time, but in practice may be short if suppliers make use of attorneys to prepare the letter containing reasons.</p>
<p>16. (3)</p>	<p>(3) The Public Procurement Office must issue a debarment order against a bidder or supplier and may issue a debarment order against any of the directors, members, trustees or partners of that bidder or supplier, if the bidder or</p>	

	(j) contravened a provision of this Act.	
16 (4)	(4) (a) The Public Procurement Office must consider the reasons submitted in terms of subsection (2)(b) and decide whether to issue a debarment order. (b) The Public Procurement Office must inform the affected person of the decision within five days from the date of the decision.	Comment: (16.4.b) Five days is a short amount of time if the letter needs to be signed off by senior officials. However, this may be positive as this puts service delivery considerations first.
16 (5)	(5) A debarment order takes effect from— (a) the date on which it is served on the affected person; or (b) if the order specifies a later date, the later date.	Comment: (16.5) This is important where there are existing contracts with various state departments or entities. Will there be any closer monitoring of debarred suppliers completion of existing contracts?
16 (6)	(6) A debarment order may not exceed the prescribed period and different periods may be prescribed for debarment in terms of subsection (3).	Comment: (16.6) This provision may allow for subjective interpretation of the appropriate number of years in the face of pressure by companies/directors.
16 (7)	(7) A debarment order prohibits the affected person, for the period specified in the debarment order, from participating in procurement by procuring institutions generally or in circumstances specified in the order.	Comment: (16.7) When the debarment period ends, will the supplier be monitored when recommencing doing business with the state? Comment: What provisions is the state making for suppliers to get user-friendly training or access to information on what is prohibited and allowed in terms of the legislation?
16 (8)	(8) (a) A person debarred in terms of this section may not engage in conduct that, directly or indirectly, contravenes the debarment order. (b) Without limiting paragraph (a), a person debarred contravenes that paragraph if the person enters into an arrangement with another person to engage in the conduct that	Comment: (16.8a) The bill does not say what the sanction is if the debarment order is contravened. Comment: (16.8) Who is responsible to ensure that suppliers are not contravening debarment orders? Recommendation: A contravention of a debarment order should constitute an offence that can be listed here.

	directly or indirectly contravenes a debarment order in accordance with the directions of the person debarred.	
16 (9)	(9) A procuring institution must— (a) inform the Public Procurement Office of any bidder or supplier alleged to have committed any of the acts listed in subsection (3) for possible debarment; and (b) submit the relevant evidence in support of the allegation.	Comment: (16.9) The onus is placed on the procuring institution to submit evidence, however the bill is silent on what needs to be done when officials at the procuring institution are involving themselves in enabling acts listed in subsection 3. Recommendation: That the Bill should make provision for which bodies may take action if the Accounting Officer or officials in a procuring institution are themselves enabling acts listed in subsection 3.
16 (10)	(10) A procuring institution must take all reasonable steps to comply with the conditions of the debarment order.	Comment: (16.10) For procuring institutions to take such steps, they need to have access to the list of debarred suppliers. It would be ideal if that list were electronically searchable. Recommendation: The list of debarred suppliers should be uploaded regularly and timeously in an accessible and easily searchable manner.
16 (11)	(11) The Public Procurement Office may, after informing the relevant procuring institution, on application by the affected person— (a) reduce the period of the debarment order; or (b) revoke the debarment order, if the order was made in error of fact, error of law or fraud.	Comment: (16.11) This provision may give rise to pressure by suppliers who do not want to be debarred. It is therefore important that there is transparency as to the reasons for a debarment order being revoked or reduced. Recommendation: Detailed reasons for debarment should be provided to suppliers and must be made accessible online.
16 (12)	(12) The Public Procurement Office must— (a) establish and maintain a debarment register of persons debarred in terms of this section; and (b) make the register publicly available.	Comment: (16.12) This is effective for transparency. The PPO should also be checking that directors on the debarment register are not involved with newly registered companies.

CHAPTER 4: PREFERENTIAL PROCUREMENT

Section	Current formulation	Comment / suggested change
17. (6)	(6) Before making a regulation under this Chapter, the Minister must consult with the Ministers responsible for trade, industry and competition, small business, women, people with disabilities and youth and any other relevant Minister whose portfolio is affected by the draft regulation.	Comment: It is important for these Ministers to reach agreement, so that there are not conflicting policy positions, therefore this is a measure that supports reduction of fragmentation.

CHAPTER 5: GENERAL PROCUREMENT REQUIREMENTS

Section	Current formulation	Comment / suggested change
18. (2)	(2) (a) The types of procurement methods to be prescribed, must include, but are not limited to, transversal term contracting and public-private partnerships. (b) The regulations envisaged in paragraph (a) for transversal term contracting must determine— (i) a process for identifying what is to be procured through transversal term contracts; and (ii) when a procuring institution must participate in a transversal term contract.	Comment: It is not fully clear who will be conducting transversal procurement. If at the national level this remains a role of the PPO, the PPO is at once regulating procurement simultaneous to conducting procurement. It is then both the 'player' and the 'referee'. Recommendation: There needs to be a greater extent of division of functions. The PPO should be an independent body (such as a chapter 9 institution). If the Treasury conducts Transversal procurement, as a procuring institution, it too should be regulated by the PPO.

18. (4) and (5)	<p>(4) The Public Procurement Office may, by instruction, determine standard bid documents.</p> <p>(5) A procuring institution may stipulate in the bid documents, irrespective of the procurement method, that bidders may only quote in South African currency, inclusive of all applicable taxes.</p>	<p>Comment: This is a good inclusion as it prevents cost escalations due to currency exchange fluctuations.</p>
18 (6) and (7)	<p>(6) (a) The Public Procurement Office must create and maintain a database in terms of section 5(1)(i) for prospective suppliers.</p> <p>(b) A procuring institution may only procure from suppliers listed in the database, referred to in paragraph (a).</p> <p>(7) A procuring institution may not split procurement or use different procurement methods to avoid the prescribed threshold.</p>	<p>Comment: This Bill is silent on the practice of departments that set up pre-authorized panels of service providers such as legal service providers. It does not deal with how those panels can tend to be used to avoid fairness in procurement.</p> <p>Recommendation: Section 18 (6) and 18 (7) should be extended to include provisions for departments that set up pre-authorized panels of service providers.</p>
19.	<p>Use of another organ of state</p> <p>19. A procuring institution may, as prescribed— (a) acquire goods, services, infrastructure or capital assets from another organ of state; (b) use another organ of state to construct, repair or maintain infrastructure or capital assets; (c) let assets to another organ of state; or (d) transfer, or otherwise dispose of assets, to another organ of state.</p>	<p>Comment: This section does not deal with value for money. For example, if that other organ of state charges a high price which gets passed on in a form of rate or charge to consumers, how are the public's rights protected?</p>

20.	<p>Function performed by another person or organisation</p> <p>20. If a procuring institution transfers funds to a person or organisation other than an organ of state to perform a function on behalf of the procuring institution in terms of legislation authorising it, any procurement required to perform the function must be in accordance with this Act.</p>	<p>Comment: This is an important control to introduce as it covers instances such as when organs of the state transfer funds to NPOs to do service provision. It is not clear if the person or organisation who the funds have been transferred to does not know how to run procurement, where they will receive guidance on this and will their procurement be audited?</p>
21.	<p>Measures to prevent abuse of procurement system</p> <p>21. The accounting officer or accounting authority of a procuring institution must—</p> <p>(a) take necessary steps to prevent non-compliance with this Act and abuse of its procurement system;</p> <p>(b) take necessary steps to ensure that no person interferes with its procurement system or is able to amend or tamper with any bid or contract;</p> <p>(c) investigate any allegation against an official or other role player of corruption, improper conduct or failure to comply with its procurement system, and—</p> <p>(i) where necessary, take steps against that official or other role player, and inform the Public Procurement Office and the relevant provincial treasury of those steps; and</p> <p>(ii) report to the South African Police Service any conduct that may constitute a</p>	<p>Comment: What entails a ‘necessary step’?</p> <p>Comment: Procuring institutions are not set up with investigative functions. This will have massive cost implications on a level of the entire state if private sector forensic firms must be procured every time.</p> <p>Recommendation: Forensic investigations are one of the areas where the state can have its own capacity. If the private sector needs to be procured to do an investigation, this is an area where transversal procurement or a prequalified panel can be set up by the National Treasury in order to reduce the time and cost of investigations, as well as potential bias.</p>

	<p>criminal offence;</p> <p>(d) reject a recommendation for the award of a bid if the recommended bidder has—</p> <p>(i) made a misrepresentation or submitted false documents in competing for a particular contract;</p> <p>(ii) been convicted of any offence involving corruption, fraud, collusion or coercion in competing for any contract; or</p> <p>(f) cancel a contract awarded to a supplier—</p> <p>(i) if it becomes aware that the supplier has made a misrepresentation, submitted false documents or information or has been convicted of any offence involving corruption, fraud, collusion or coercion in competing for a particular bid or during the execution of the contract; or</p> <p>(ii) if any official or other role player was convicted of any offence involving corruption, fraud, collusion or coercion during the bidding process or during the execution of the contract.</p>	<p>Comment: Will every single procuring institution be setting up the capability to prevent and detect corruption, fraud, collusion and coercion? It seems unlikely that this will be implemented.</p>
22.	<p>Establishment of procurement units</p> <p>22. (1) Every procuring institution must establish a procurement unit as part of its procurement system.</p> <p>(2) The responsibilities of the procurement unit must at least include the following:</p> <p>(a) Implementation of functions allocated to the unit in terms of this Act and the procurement system of the procuring institution;</p>	

	<p>(b) maintenance of its procurement system to ensure effectiveness and efficiency;</p>	<p>Recommendation: Insert the word “regular” before maintenance in sub-section (b).</p>
<p>23. (1) and (2)</p>	<p>Bid committee system</p> <p>23. (1) The Minister must prescribe a bid committee system for procuring institutions and the functions of each committee.</p> <p>(2) The following persons may not be members of a bid committee envisaged in subsection (1):</p> <p>(a) A public office bearer;</p> <p>(b) a person appointed in terms of section 12A of the Public Service Act; and</p> <p>(c) any person having a conflict of interest.</p>	<p>Comment: (23.2.c) Conflict of interest is not defined.</p> <p>Recommendation: Provide a definition of conflict of interest in Chapter 1, Section 1.</p>
<p>24.</p>	<p>Part 2</p> <p>Use of technology in procurement information and communication technology-based procurement system</p> <p>24. (1) The Public Procurement Office must develop an information and communication technology-based procurement system that complies with section 18, for all procurement, in order to enhance efficiencies, effectiveness, transparency and integrity and to combat corruption.</p> <p>(2) After conducting an information and communication technology due diligence of the sector, to assist with the formulation</p>	<p>Comment: (24.1) Does ‘develop’ imply that there will be coding done to create a system and that this build will be overseen by the PPO’s office? It is not clear if SITA will be involved. SITA does not appear to be adding value when it comes to procuring IT for the state. There are numerous instances of unsuccessfully completed IT projects where significant amounts of money have been spent and licenses have not been used or systems have not been fit for purpose.</p>

	<p>of the design brief for the development of the procurement system, referred to in paragraph (a), the system must, subject to the due diligence conducted, provide for the following components progressively:</p> <p>(a) A single platform that at least provides access for officials, bidders, suppliers and members of the public to all procurement related services; (b) standardised and interoperable open data across the procurement cycle to be used by procuring institutions according to their readiness determined in accordance with an instruction;</p> <p>(c) uniform procurement procedures and processes;</p>	<p>Comment: (24.2.c) With reference to uniform procurement procedures, the Bill itself seems to create a situation where the procurement procedures could be highly differentiated across provinces and forms of procurement.</p>
25.	<p>Use of technology by procuring institutions</p> <p>25. (1) Procuring institutions must— (a) to the extent possible, use technology for the implementation of this Act; and (b) when available, use the different components of the procurement system, referred to in section 24(b).</p> <p>(2) (a) During the development of the procurement system, referred to in section 24(1)(a), the Public Procurement Office must, by instruction, determine requirements for digitisation, automation, reporting and innovations that information and communication technology may enable, applicable to procurement processes by procuring institutions.</p>	<p>Comment: Many departments and entities still rely on paper based processes. Some have started to develop more sophisticated digital systems or fully fledged e-procurement systems. Those who do not publish information often cite insufficient resources as a reason not to digitalise documents.</p> <p>Recommendation: The Bill should specify minimum technology standard and support for all entities to submit digital information to the central database as a minimum.</p>

	<p>(b) The requirements referred to in paragraph (a) must include the provision for—</p> <p>(i) analysis and publication of data; and</p> <p>(ii) readiness assessments for procurement technology.</p>	
26. (1)	<p>26. (1) The Public Procurement Office must determine, by instruction, measures for the public, civil society and the media to -</p>	<p>Comment: The provision does not contain the content of what the measures will be, as the content will be laid out in the instructions. It is therefore not clear whether they will be reasonable. The provision also does not subject the instructions to reasonableness requirements. It is necessary to specify that the access measures contained in the instructions must be reasonable.</p> <p>Recommendation: (insert) “...reasonable measures for the public, civil society and the media...”</p>
26. (1)(c)	<p>26. (1)(c) monitor high-value or complex procurement that entail significant risks of mismanagement and corruption.</p>	<p>Comment: The qualifier “high-value or complex procurement that entail significant risks of mismanagement and corruption” creates a qualifier which limits the PPO’s powers by not enabling it to determine measures for monitoring all other types of procurement falling below this standard. This goes against the spirit of the clause and the principle of transparency.</p> <p>Recommendation: Change S 26(1)(c) to read: monitor procurement.</p>
27.	<p>Disclosure of procurement information</p> <p>27. (1) The Public Procurement Office must, by instruction, determine requirements to disclose information regarding procurement.</p> <p>(2) The instruction envisaged in subsection (1) must, among others, require—</p> <p>(a) the categories of information to be disclosed to enable effective monitoring of procurement, which includes among others—</p>	<p>Comment: National Treasury has been issuing instructions calling for mandatory publication of procurement information and yet very few departments and entities comply. This appears to be a continuation of the same approach and it is unclear how this will change the scenario to ensure that at least the minimum level of information is published by all procurement entities in a timely fashion</p> <p>Recommendation: This Bill must specify the minimum information to be published, a clear and unambiguous time frame, and an appropriate sanction for non compliance.</p>

	<p>(i) the reasons for the decision, if a decision is made to not follow an open competitive tender process;</p> <p>(ii) all information regarding a bid;</p> <p>(iii) the identity of each entity which submits a bid, including information relevant to that entity contained in the companies register established under section 187(4) of the Companies Act, 2008 (Act No. 71 of 2008), if applicable;</p> <p>(iv) the date, reasons for and value of an award to a bidder, including the record of the beneficial ownership of that bidder required under section 56(12) of the Companies Act, 2008 (Act No. 71 of 2008); and</p> <p>(v) contracts entered into with a supplier and invoices submitted by the supplier;</p> <p>(b) that the information referred to in paragraph (a) be published as quickly as possible—</p> <p>(i) on an easily accessible central online portal that is publicly available free of charge; and</p> <p>(ii) in a format that—</p> <p>(aa) enables tracking of information relevant to the entire process of a specific procurement;</p> <p>(bb) is electronic and interoperable; and</p> <p>(cc) if it contains confidential information, only that information is severed.</p>	
30. (1)	<p>Protection of information</p> <p>30. (1) No person may disclose confidential information held by or obtained from the Public Procurement Office or a provincial treasury for</p>	<p>Comment: This provision must be balanced with an imperative for transparency in order to ensure that public funds are used efficiently and effectively. It can potentially be used in a punitive manner against potential whistleblowers and result in greater opacity of procurement information. There should be limited instances in which</p>

	<p>purposes of this Act, except—</p> <p>(a) for carrying out a provision of this Act or any other legislation;</p> <p>(b) with the permission of the Public Procurement Office or the relevant provincial treasury;</p> <p>(c) for the purpose of legal proceedings, including any proceedings before a judge in chambers; or</p> <p>(d) in terms of an order of court.</p>	<p>procurement information should be deemed confidential.</p>
30. (2)	<p>(2) The Public Procurement Office or a provincial treasury must take appropriate measures in respect of personal information in its possession or under its control to prevent—</p> <p>(a) loss of, damage to or unauthorised destruction of the information; and</p> <p>(b) unlawful access to or processing of personal information, other than in accordance with this Act and the Protection of Personal Information Act, 2013 (Act No. 4 of 2013).</p>	<p>Comment: An important aspect of this is that the IT function that the PPO's office relies on is effective. Civil Society's engagements with National Treasury do not provide comfort that National Treasury's IT and/or SITA is strategically aligned with providing support services to fulfil its mandate. Nor does it appear capable of ensuring that basic IT measures like well-functioning email, servers, business continuity measures etc are in place.</p>

CHAPTER 6: DISPUTE RESOLUTION

Section	Current formulation	Comment / suggested change
31 (1) and (2)	<p>DISPUTE RESOLUTION</p> <p>Part 1</p> <p>Reconsideration of decision to award</p> <p>Reconsideration by procuring institution</p>	

	<p>31. (1) A bidder may submit an application for reconsideration to the procuring institution if that bidder is not satisfied with a decision to award a bid by that institution.</p> <p>(2) An application referred to in subsection (1) must be submitted to the procuring institution within 10 days of the date the bidder is informed of the decision to award a bid.</p>	<p>Comment: This contains an assumption that all bidders are aware of the outcome of the bid award process. If the SCM process does not entail issuing both the letter of award and letters of regret as well as putting the outcome of the process on the website, bidders will not know the outcome.</p> <p>Recommendation: The SCM process must formally include the issuing of a letter of award or regret and the timeous uploading of the outcome of the process on its website.</p> <p>Comment: If the bidder is not informed of the outcome immediately after that has been decided and a letter is sent administratively with a delay and the bidder then much later submits a request for reconsideration, what will occur?</p>
31 (3)	<p>(3) A procuring institution may dismiss an application for reconsideration if the application was not submitted within 10 days of the date the bidder is informed of the decision to award a bid.</p>	<p>Comment: If the procuring institution deliberately did not inform bidders of the outcome of a bid in a hypothetical instance where there has been tender rigging, what are the rights of the losing suppliers?</p>
31 (4)	<p>(4) Unless the application is dismissed as envisaged in subsection (3) or withdrawn by the bidder, the procuring institution must—</p> <p>(a) immediately institute an investigation; and</p> <p>(b) make a decision and inform the bidder within the prescribed timeframes.</p>	<p>Comment: This provision has the potential to ratchet up the cost of investigations and may be abused as investigations are lucrative business.</p> <p>Recommendation: A timeframe must be provided for the investigation to be completed due to the impact that long timeframes have on (a) the cost of investigations and (b) service delivery.</p>
31 (5)	<p>(5) A decision referred to in subsection (4)(b)—</p> <p>(a) must state whether the application is granted or dismissed, in whole or in part;</p> <p>(b) must state the reasons for the decision;</p> <p>and (c) may state any corrective</p>	<p>Comment: Have the service delivery and budget implications of this provision been considered? Where the supplier is concerned that the procuring entity has engaged in malfeasance, what prospect is there for the investigation that is being commissioned by that institution to arrive at a different decision?</p> <p>Recommendation: The PPO must also be made aware by suppliers that they are making a request for reconsideration.</p>

	measures to be taken.	
31 (6)	(6) A bidder seeking a reconsideration of a decision to award a bid must pay the prescribed fee.	<p>Comment: The Bill does not stipulate which body will determine the prescribed fee, where it will be published nor which entity it must be paid to.</p> <p>Recommendation: A bidder seeking a reconsideration of a decision to award a bid must pay the prescribed fee, which amount will be determined by the PPO.</p>
	<p>Composition of Tribunal</p> <p>33. (1) The Tribunal consists of as many members as the Minister appoints with due regard to section 34.</p> <p>(2) The members of the Tribunal must include—</p> <p>(a) one person who is a retired judge who must be the Chairperson;</p> <p>(b) a sufficient number of persons with 10 years' experience in law; and (c) a sufficient number of persons with 10 years' experience in procurement.</p> <p>(3) The Minister must appoint the Chairperson with the concurrence of the Minister responsible for justice.</p> <p>(4) The Minister must appoint a member of the Tribunal referred to in subsection (2)(b) as the Deputy Chairperson.</p>	<p>Comment: It may be better to state a minimum number as being sufficient, because Ministers of Finance usually have budget in mind and sometimes err on the side of too few human resources because of their budgetary mandate and mindset.</p> <p>Recommendation:</p> <p>(2) The members of the Tribunal must include a <i>minimum of twelve persons</i>—</p> <p>(a) one person who is a retired judge who must be the Chairperson;</p> <p>(b) <i>five</i> persons with 10 years' experience in law; and</p> <p>(c) <i>five</i> persons with 10 years' experience in procurement.</p> <p>Recommendation: An appointing committee inclusive of the Minister must appoint and terminate the terms of members of the Tribunal, instead of this function being left to the Minister alone. This will ensure more transparency, accountability in appointment and termination processes for Tribunal members.</p> <p>Recommendation: The Deputy Chairperson appointment should also be subject to</p>

		concurrence of the Minister of Justice, as the Deputy Chairperson can be called upon to act on behalf of the Chairperson.
34 (1) and (2)	<p>Qualification of members of Tribunal</p> <p>34. (1) A person may be appointed as a member of the Tribunal if that person— (a) possesses the necessary skills, expertise and knowledge; and (b) is a citizen or permanent resident of the Republic.</p> <p>(2) The Minister must, by notice in the Gazette and at least two newspapers circulating widely in the Republic, invite any interested person within the Republic to nominate a person meeting the requirements for appointment to the Tribunal as a candidate for appointment.</p>	<p>Comment: (34.1) How will prospective members of the Tribunal be vetted to ensure that their qualifications are in order?</p> <p>Recommendation: 34 (c) Recommended persons will be subjected to vetting processes upon the recommendation of the Minister and appointing members.</p> <p>Comment: (34.2) In the instance that someone is nominating another person, what are the provisions to ensure that the nominee is aware and willing to be nominated? Can persons apply as opposed to being nominated?</p> <p>Recommendation: (2) The Minister must, by notice in the Gazette and at least two newspapers circulating widely in the Republic, invite any interested person within the Republic to apply for or nominate a person meeting the requirements for appointment to the Tribunal as a candidate for appointment.</p> <p>Comment: Further clarity is needed on whether this nomination process will be conducted publicly i.e will the public have an opportunity to provide input on shortlisted candidates after the nominations?</p> <p>Comment: There must be reference to a shortlisting process here and not solely in the regulations. Section 34 must therefore include a sub-section (3) that makes reference to the shortlisting process.</p>
35 (1) and (2)	<p>Functions of Chairperson and Deputy Chairperson of Tribunal</p> <p>35. (1) The Chairperson— (a) must preside at meetings of the Tribunal; and</p>	<p>Comment: What does this responsibility entail?</p>

	<p>(b) is responsible for managing the work of the Tribunal.</p> <p>(2) The Deputy Chairperson performs the functions of the Chairperson— (a) on delegation by the Chairperson; (b) in the absence of the Chairperson; or (c) if the office of the Chairperson is vacant.</p>	<p>Comment: (35.2) That the Deputy Chairperson may be required to perform the functions of the Chairperson builds the case for why there should ideally also be concurrence with regards to the appointment of the Deputy Chairperson.</p> <p>Comment: A subsection (3) must be included in this section that makes provision for the reasons for the delegation being made.</p>
36	<p>Disclosure of interest by members of Tribunal</p> <p>36. (1) Subject to subsection (2), a member of the Tribunal may not participate in the proceedings at any meeting of the Tribunal, if in relation to any matter before the Tribunal— (a) the member or a person related to him or her is a director, member or partner of, or has controlling interest or any financial interest in, the business of the bidder or any person who made representations in relation to the application by the bidder; or (b) the member has any interest which precludes him or her from performing his or her functions as a member in a fair, unbiased and proper manner.</p> <p>(2) (a) If at any stage during the proceedings before the Tribunal it appears that a member has or may have any interest envisaged in subsection (1), the member must immediately fully disclose the nature of the interest and leave the proceedings to enable the remaining members to determine whether the</p>	<p>Comment: Who is the disclosure of interests made to?</p> <p>Comment: There is a gap here regarding the 'person related to him or her'. It should be expanded.</p> <p>Recommendation: 36. (1) Subject to subsection (2), a member of the Tribunal may not participate in the proceedings at any meeting of the Tribunal, if in relation to any matter before the Tribunal— (a) the member or a person related to him or her is a director, member or partner of, or has controlling interest or any financial interest in, the business of the bidder or any person who made representations in relation to the application by the bidder.</p> <p>Comment: Will the minutes be available? If not, who aside from a limited number of Tribunal members has access to them?</p>

	<p>member must be precluded from participating in the proceedings by reason of a conflict of interest.</p> <p>(b) The disclosure envisaged in paragraph (a) and the decision taken by the remaining members regarding the determination must be recorded in the minutes of the proceedings.</p> <p>(c) If any member fails to disclose any interest envisaged in subsection (1) or if, having such interest, the member attends or in any manner contributes to the proceedings of the Tribunal, the contribution must be disregarded, but the decision of the Tribunal is not invalid.</p>	<p>Recommendation: (b) The disclosure envisaged in paragraph (a) and the decision taken by the remaining members regarding the determination must be recorded in the minutes of the proceedings which may be made public upon request.</p> <p>Comment: Can members of the public provide information relating to the failure of a disclosure by a member of the Tribunal? Who can they provide this information to and in what format?</p>
37.	<p>37. (1) A member of the Tribunal holds office for a period of five years, or the shorter period that the Minister determines.</p> <p>(2) A member of the Tribunal may be re-appointed at the expiry of a term for a further term not exceeding three years.</p> <p>(3) A member of the Tribunal may resign by giving at least three-months' notice to the Minister, or the shorter period as the Minister approves.</p> <p>(4) The Minister may terminate the appointment of a member of the Tribunal if—</p> <p>(a) the member is unable to perform the functions of office due to ill health or other reasons accepted by the Minister;</p> <p>(b) the member fails to disclose an interest in terms of section 36(2); or (c) an</p>	<p>Comment: Will this imply that if most of the members are appointed at the same time initially, that their term will come to an end at the same juncture? How will some extent of continuity and seamlessness be established?</p> <p>Recommendation: There must be an inclusion of a clause for continuity purposes. We therefore recommend that a minimum of two Tribunal members be re-appointed for continuity purposes.</p> <p>Comment: The Tribunal members being political appointees could result in an extent of turnover at the Tribunal of the nature that has been seen at State Owned Entity Boards.</p> <p>Comment: Regarding 'Other reasons accepted by the Minister' will the reasons be made available for public scrutiny? This would avoid instances where there is indirect or direct political pressure .</p> <p>Comment: How will the Minister become aware of this? Does this imply that political</p>

	<p>independent inquiry by the Minister has found that the member has— (i) failed in a material way to discharge his or her responsibilities; or (ii) acted in a way that is inconsistent with continuing to hold office.</p> <p>(5) Subject to the Promotion of Administrative Justice Act, if an independent inquiry has been undertaken in terms of subsection (4)(c), the Minister may suspend the affected member from office pending a decision.</p> <p>(6) The Minister must determine the remuneration and other conditions of service for members of the Tribunal.</p>	<p>offices will have access to the minutes and documentation of the Tribunal?</p> <p>Comment: Given that the Chairperson is a retired Judge, should the suspension processes be done in concurrence with the Minister of Justice?</p> <p>Comment: It should be stipulated in this clause where this information will be made available. (i.e NT website etc)</p> <p>Recommendation: (6) The Minister must determine the remuneration and other conditions of service for members of the Tribuna which will be published on the National Treasury or Tribunal’s website.</p>
43. (1)	43. (1) If a bidder is not satisfied by a decision made by a procuring institution in terms of section 31, that bidder may, within 10 days of being informed of the procuring institution’s decision, submit an application for review to the Tribunal.	<p>Comment: 10 days is a short-timeframe considering possible delays. It might be better to suggest a rephrase that includes a slightly more workable timeframe (15-20 working days).</p> <p>Recommendation: 43. (1) If a bidder is not satisfied by a decision made by a procuring institution in terms of section 31, that bidder may, within 15 days of being informed of the procuring institution’s decision, submit an application for review to the Tribunal.</p>
43. (3)	The Tribunal must inform the bidder of its decision in terms of subsection (2) and the reasons within five days from the date of receipt of the request.	<p>Comment: If the Tribunal is insufficiently staffed and resourced, it will battle to meet this requirement. This also does not consider the need for further investigations or dialogue that may take more than five days. Rephrase should include 15 days.</p> <p>Recommendation: (3) The Tribunal must inform the bidder of its decision in terms of subsection (2) and the reasons within fifteen (15) days from the date of receipt of the request.</p>
45.	A bidder or a person debarred seeking a review of a decision in terms of this Part must pay the prescribed fee.	<p>Comment: The Bill does not stipulate where the prescribed fee will be published and who it will be payable to. If payable to the Tribunal, it is not clear what the Tribunal will do in the instance that it suspects that the money being paid is the proceeds of crime.</p>

		<p>It is also not clear if there will be uniform prescribed fees or whether it will depend on a case by case basis.</p> <p>Recommendation: The provision must clarify if there will be uniform prescribed fees to be included in the Regulations, or if there will be determined on a case by case basis. If the letter, the criteria for determining the fee should be determinable by regulations.</p>
49. (1)	<p>If a procurement process is subject to— (a) a reconsideration in accordance with section 31, a procuring institution may not conclude a contract with the successful bidder within 10 days after completion of the reconsideration process; or (b) review in accordance with section 43, a procuring institution may not conclude a contract with the successful bidder prior to completion of the review process.</p>	<p>Comment: A possible impact of this process is that businesses need to generate cash flow and will take on other work. When the state institution can resume with contracting, they may not have sufficient capacity due to other commitments.</p> <p>Recommendation: Implications of this must be considered and addressed.</p>
49.(4)	<p>The request of the procuring institution referred to in subsection (2) must— (a) state the emergency that require the conclusion of the contract; (b) state the grounds for the emergency; and (c) specify the quantity required to meet the emergency.</p>	<p>Comment: Who must the request be made to? The Tribunal or the PPO? If the Tribunal has a backlog, will it be able to process emergency requests?</p> <p>Recommendation: Clarity must be provided on who the request will be made to and how backlogs will be dealt with in the Bill.</p>
	Not covered in the bill	<p>Comment: The Bill does not address dispute resolution during the contract management stage. For example, if a department considers that a service provider has not delivered adequately in line with the contract, but the service provider thinks that they have.</p>

CHAPTER 7: GENERAL PROVISIONS

Section	Current formulation	Comment / suggested change
50	(3) Where a procuring institution is required to act in terms of subsection (2), the procuring institution must, as required by the Public Procurement Office, report on the progress made.	<p>Comment: Disciplinary matters are meant to be addressed within a prescribed amount of time, however this is not occurring and sometimes officials remain on paid suspension for a number of months and even years, which is at the expense of the taxpayer. The bill does not address what should be done in the instance that the appropriate action is not taken within 90 days.</p> <p>Recommendation: insert a 90 day deadline for the procuring institutions to report on the progress made in taking action. Include an appropriate sanction for failing to meet this deadline and make provision for condonation for missing the deadline in exceptional circumstances.</p>

CONCLUSION

The Public Procurement Bill that is before Parliament is a pivotal piece of legislation that wields immense influence over the provision of public services and, by extension, the realisation of fundamental human rights for citizens. Public procurement is not merely an administrative process; it is the lifeline through which vital public services are delivered to communities. The choices made in procurement decisions can have far-reaching consequences on the quality of education, healthcare, infrastructure, and countless other services that impact the daily lives of citizens.

As we submit our recommendations to Parliament, we earnestly hope that our efforts will not be overlooked in the crucial public participation process. We call upon all stakeholders, legislators, and citizens to engage in a thorough and thoughtful discussion of the Public Procurement Bill. In doing so, we can collectively ensure that the final legislation reflects the values and aspirations of our society.

Transparency, accountability, and integrity must serve as the cornerstones of any public procurement framework. These principles are not optional; they are the bedrock upon which trust in government actions is built. To uphold the principles of transparency, we must ensure that procurement processes are open to scrutiny, and that information is readily accessible to the public. Accountability requires that decision-makers are answerable for their actions and that mechanisms are in place to rectify any deviations from established norms. Finally, integrity is non-negotiable, as it ensures that procurement is free from corruption and undue influence.

In closing, let us recognise that the Public Procurement Bill is not just a legal text; it is a contract with the people. It is a commitment to the realisation of human rights and the efficient delivery of public services. It is an embodiment of the collective responsibility to act with transparency, accountability, and integrity.

SUBMISSION ENDORSEMENTS

The following organisations endorse this submission:

1. Centre for Child Law
2. Corruption Watch
3. Equal Education
4. Equal Education Law Centre
5. Institute for Economic Justice
6. Legal Resources Centre
7. Open Secrets
8. Public Service Accountability Monitor
9. Rural Health Advocacy Project

ABOUT THE BUDGET JUSTICE COALITION

The purpose of the [Budget Justice Coalition](#) is to collaboratively build people's understanding of and participation in South Africa's planning and budgeting processes – placing power in the hands of the people to ensure that the state advances social, economic and environmental justice, to meet people's

needs and wellbeing in a developmental, equitable and redistributive way in accordance with the Constitution.

Budget Justice Coalition Steering Committee:

Independent (Chairperson) | Motlatsi Komote

Rural Health Advocacy Project (Vice Chairperson) | Phemelo Khaas

Children's Institute, UCT (Treasurer) | Kath Hall

Public Service Accountability Monitor | Lisa Higginson

Legal Resources Centre | Tsukudu Moroeng

Alternative Information and Development Centre | Andile Cele

Corruption Watch | Melusi Ncala

Section27 | Matshidiso Lenchoasa

Centre for Child Law | Fortunate Mongwai

ABOUT IMALI YETHU

Imali Yethu is a coalition of civil society organisations working with the South African National Treasury to make budget information more accessible, user-friendly and empowering. We are committed to exploring co-creation to achieve open, accountable governance. Our work is inspired by the [standards](#) of co-creation and participation envisioned by the Open Government Partnership (OGP). Refer to Imali Yethu's [website](#) for more information.